pursuant to Court order

Commonwealth of Kentucky
Supreme Court
2014-SC-000749-DG

Garry W. Newkirk
Appellant

On Discretionary Review
From the Kentucky Court of Appeals
No. 2011-CA-001819

V.

Appeal from the Jefferson Circuit Court
Hon. Olu A. Stevens, Judge
Action Nos. 11-CR-0462 and 11-CR-2576

Commonwealth of Kentucky
Appellee

Brief for Appellant, Garry W. Newkirk

Submitted By:

Elizabeth B. McMahon
Assistant Public Defender
Office of the Louisville Metro
Public Defender
Advocacy Plaza
717-719 West Jefferson Street
Louisville, Kentucky 40202
(502) 574-3800
Counsel for Garry W. Newkirk

Certificate of Service

I hereby certify that a copy of this brief was mailed with first-class postage prepaid to Hon. Olu A. Stevens, Judge, Jefferson Circuit Court, Division Six, Jefferson County Judicial Center, 700 West Jefferson Street, Louisville, KY 40202, and Hon. Dorislee Gilbert, Special Assistant Attorney General, 514 West Liberty Street, Louisville, KY 40202 on October 21, 2015. I further certify that the record on appeal has not been removed from the Office of the Clerk of the Supreme Court.

Elizabeth B. McMahon
ELIZABETH B. McMAHON

INTRODUCTION

The Commonwealth appealed from the order of the Jefferson Circuit Court granting Garry Newkirk's motion in limine to exclude testimony concerning the contents of a destroyed surveillance video that had not been tendered in discovery or preserved for purposes of trial. The Court of Appeals reversed the circuit court's order, and this Court granted Garry Newkirk's motion for discretionary review.

STATEMENT CONCERNING ORAL ARGUMENT

The appellant believes that oral argument would be helpful to this Court. As the Court of Appeals acknowledged, "no published Kentucky appellate opinion has addressed the permissible scope of opinion testimony regarding the contents of a lost or destroyed videotape." (App. A32).

NOTICE TO CITATIONS

Citations to the record of the Jefferson Circuit Court Clerk are made (TR, indictment number, page number). References to the Appendix to this brief are made (App., page number). References to the digital recordings of the court proceedings are made in conformance with CR 98 (VR, date, time) and include the following:

VR No. 1: Trial proceedings conducted on 9/6/11;

VR No. 2: Trial proceedings conducted on 9/7/11; and

VR No. 3: Pretrial proceedings conducted on 3/28/11, 5/24/11, 7/18/11, 8/15/11, and 9/2/11.

STATEMENT OF POINTS AND AUTHORITIES

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STATEMENT OF THE CASE

The Jefferson County Grand Jury returned indictments charging the appellant, Garry W. Newkirk, with one count of burglary in the second degree and with being a persistent felony in the first degree. The cases were assigned to Division Six of the Jefferson Circuit Court. (TR 11CR0462, 1; TR 11CR2576, 1-3).

According to the bill of particulars provided by the Commonwealth, Garry Newkirk was charged with breaking into Pearlette Issac's apartment and "[t]he incident was captured on the apartment complex video system." (TR 11CR0462, 13). Ms. Issac watched the video surveillance with detectives and the apartment complex manager, and Ms. Issac believed that the man in the video was Garry Newkirk's brother, Daniel Newkirk. (TR 11CR0462, 13). Detectives interviewed Daniel Newkirk, but Daniel claimed that Garry had committed the offense. (TR 11CR0462, 13). Daniel also told police that he and Garry had been in a Circle K store prior to the time the burglary was committed. (TR 11CR0462, 13, 15; Discovery CD, p. 13).[1] The police obtained a copy of the Circle K surveillance video and according to Detective Kevin Lewis, Garry Newkirk was wearing clothing identical to those worn by the man on the apartment complex surveillance video. (TR 11CR0462, 47). However, Detective Lewis acknowledged "you can't see his face in the video." (TR 11CR0462, 47).

At a pretrial conference on August 15, 2011, both parties expressed an interest in obtaining a quick trial date, and a jury trial was scheduled for September 6, 2011. (VR No. 3, 8/15/11, 10:21:05-10:25:22). Defense counsel

[1] A CD containing pages 1-13 of discovery is located in the 11CR0462 file.

pointed out that a detective had purportedly reviewed a surveillance video from the apartment complex where the burglary had allegedly occurred but that the Commonwealth did not have this video. (VR No. 3, 8/15/11, 10:25:35). The prosecutor verified this information, stating that Detective Lewis had viewed the surveillance video but had been unable to make a copy. The prosecutor further stated that she did not have the video, that she did not believe the video existed any longer because the system had recorded over it, and that she did not intend to introduce it at trial. (VR No. 3, 8/15/11, 10:26:14-10:27:33). At that time, the Commonwealth did not indicate that it would seek to introduce testimony about the deleted surveillance, but defense counsel preemptively noted that any testimony that the person on the video supposedly looked like Garry Newkirk would be inadmissible. (VR No. 3, 8/15/11, 10:27:33-10:28:01).

On September 2, 2011, defense counsel filed a written motion to reassign the trial to a different date due to concerns that the jury pool had been tainted by a deputy sheriff's inappropriate comments. (TR 11CR0462, 36-41). After listening to arguments from both the defense and the Commonwealth, the judge determined that it was premature to conclude that the jury pool was tainted and decided that the matter could be addressed during voir dire. The judge, therefore, held its ruling in abeyance pending questioning of the individual jurors. (VR No. 3, 9/2/11, 11:00:55-11:43:04).

On September 6, 2011, the Commonwealth announced it was ready for trial. Defense counsel also stated she was ready for trial, subject to the trial

court ruling on the pending motion concerning the possibly tainted jury pool. (VR No. 1, 9/6/11, 12:03:13-12:06:15). The Commonwealth then stated that it intended to call the apartment complex manager to testify about the video surveillance equipment, her inability to make a copy of the video, and the fact that the video was no longer available. (VR No. 1, 9/6/11, 12:07:53-12:08:50). The Commonwealth also noted that Detective Kevin Lewis of the Louisville Metro Police Department had reviewed the video before it had been recorded over, that the detective had recently prepared a summary of what he saw on the video, and that he would testify to what he observed on the video. (VR No. 1, 9/6/11, 12:08:50-12:09:02).

Citing KRE 701, KRE 602, and the cases of Mills v. Commonwealth, 996 S.W.2d 473 (Ky. 1999), and Fields v. Commonwealth, 12 S.W.3d 275 (Ky. 2000), defense counsel objected to these witnesses testifying about the deleted video surveillance and its contents. Defense counsel further argued that such testimony would be inadmissible even if the video was still available and properly authenticated. (VR No. 1, 9/6/11, 12:10:08-12:14:51). The Commonwealth claimed that this testimony did not constitute hearsay and was admissible under KRE 701 because the detective would be testifying to what he had observed on the video and defense counsel would have the opportunity to cross-examine the witness. (VR No. 1, 9/6/11, 12:14:51-12:16:58, 12:18:29-12:19:43). The circuit court found a distinction between personal, firsthand observation of something and reviewing a video and then drawing conclusions based on that review,

especially where the defendant never had access to that video. (VR No. 1, 9/6/11, 12:16:58-12:18:29, 12:24:06-12:26:17). The court determined that it would not be equitable to allow any testimony about the absent video under these circumstances because it would hamper the defendant's ability to confront and cross-examine the detective about what the video supposedly revealed. The court further noted that permitting such testimony could open the door to future abuses because the police and the Commonwealth would have no reason to turn over videos in discovery if witnesses could simply testify about what they purportedly saw when they reviewed the video. (VR No. 1, 9/6/11, 12:19:43-12:24:06). The court, therefore, sustained defense counsel's objection and held that no testimony about the missing video would be permitted. (VR No. 1, 9/6/11, 12:22:19-12:24:06, 12:24:28-12:26:17).

After addressing these pretrial matters, the court and the parties began conducting individual voir dire to determine if any jurors had been tainted. At a break during individual voir dire, the prosecutor requested that the court provide a written copy of its ruling concerning the deleted video. (VR No. 1, 9/6/11, 4:49:46-4:50:09). The circuit court reiterated its previous oral ruling, stating that it would be entirely inequitable to put the defendant in the position of cross-examining an individual who reviewed the video without the defendant having had the opportunity to review the video. (VR No. 1, 9/6/11, 4:50:09-4:52:00). The Commonwealth complained that there would be a hole in its case without this testimony because the surveillance video is what eventually led the police to

Garry Newkirk. (VR No. 1, 9/6/11, 4:52:00-4:52:30). The court stated that it was more concerned about the jury drawing unfounded conclusions about what was on the video and emphasized the need to protect the defendant's rights. The court was adamant that it could not allow the jury to draw an inference that Garry Newkirk was on the video, that he did something on the video, or that the video led to Garry's arrest, given the fact that Garry and his attorney had never had access to this video and that the video no longer existed. (VR No. 1, 9/6/11, 4:52:30-4:55:54). However, the court agreed to revisit the issue the next day in order to allow the Commonwealth time to perform research that night. (VR No. 1, 9/6/11, 4:55:54-4:56:15).

After resuming individual voir dire, the circuit court concluded that the jury panel had not been tainted by the deputy sheriff's comments and determined that general voir dire would be conducted the following day. (VR No. 1, 9/6/11, 4:56:22-6:31:25, 6:32:55-6:34:30). The prosecutor indicated that she would have to "figure out what my actions will be tomorrow" given the court's exclusion of any testimony about the apartment video surveillance. (VR No. 1, 9/6/11, 6:31:43-6:32:55).

The next morning, the Commonwealth indicated that it had "a new wrinkle" in its case because it had been unable to subpoena Garry Newkirk's brother, Daniel Newkirk, who was the Commonwealth's main witness. (VR No. 2, 9/7/11, 10:42:18-10:43:06). The prosecutor stated that she had spoken to Daniel on September 2, but Daniel said he had not received a subpoena because

he had moved. The prosecutor said that she tried to have him served at the new address but that Daniel had provided an incorrect address. The prosecutor then obtained the correct address through Daniel's probation officer and attempted to serve the subpoena that morning. However, no one answered the door at that residence, and Daniel would not respond to phone calls. (VR No. 2, 9/7/11, 10:42:18-10:43:06, 10:44:28-10:45:35). The Commonwealth requested that the trial be continued due to its inability to locate Daniel Newkirk and based on the court's ruling excluding evidence of the video surveillance. (VR No. 2, 9/7/11, 10:43:06-10:43:18). The prosecutor argued that she could not prove her case without Daniel Newkirk and without testimony concerning the video surveillance. (VR No. 2, 9/7/11, 10:45:35-10:45:55).

Defense counsel objected to a continuance, arguing that both parties had announced ready for trial and that they were currently in the middle of jury selection. Defense counsel pointed out that although she had filed a motion to continue the trial due to the possibility of a tainted jury pool, they had already conducted individual voir dire on that subject, the circuit court had concluded this panel was not tainted, and defense counsel was ready to proceed with the trial. (VR No. 2, 9/7/11, 10:43:21-10:44:24).

The court stated that it had already ruled on the inadmissibility of the video and that it had not changed its mind. (VR No. 2, 9/7/11, 10:45:55-10:26:24). The court noted that it had not anticipated that the Commonwealth would attempt to offer testimony based on review of a video that no longer

exists and that the Commonwealth should not have expected to introduce such testimony. (VR No. 2, 9/7/11, 10:26:24-10:46:50). The court then denied the motion for a continuance, indicating that it had already spent a significant amount of time on jury selection and that the Commonwealth should have been able to subpoena Daniel Newkirk given the fact that he is on probation and had been in contact with the Commonwealth. (VR No. 2, 9/7/11, 10:46:50-10:48:00).

At this point, the Commonwealth moved to dismiss the case without prejudice, and the circuit court granted the motion. (VR No. 2, 9/7/11, 10:48:03-10:48:29). Despite the dismissal, the Commonwealth then asked for the court to clarify its ruling once again about the video surveillance and asked if the court's ruling was based on a finding that the testimony would be unduly prejudicial under KRE 403. (VR No. 2, 9/7/11, 10:48:29-10:48:49, 10:51:00-10:51:11). Agreeing to engage in an "academic discussion" with the Commonwealth, the court reiterated that the Commonwealth had an obligation to preserve evidence and that the Commonwealth should not be allowed to introduce testimony about a video that was reviewed by the detective but not preserved. The court also pointed out that the Commonwealth did not indicate until the morning of trial that it intended to introduce this testimony, even though the Commonwealth had earlier confirmed that the video no longer existed.[2] The court emphasized

[2] The Court of Appeals asserts that the circuit court's statement "is not entirely correct, otherwise there would have been no need for Newkirk, three weeks earlier on August 15, 2011, to verbally move to prohibit testimony regarding the videotape." (App. A4, fn. 2). However, the record is clear that on August 15, the prosecutor only confirmed that the surveillance video was not in her possession,

that allowing the testimony in this case would be fundamentally inequitable and that it could lead to future abuses in the legal system. (VR No. 2, 9/7/11, 10:48:49-10:54:24).

Despite having dismissed the case and having orally reiterated its ruling several times, the circuit court granted the Commonwealth's request to put its ruling in writing and entered a written order on September 14, 2011. (TR 11CR0462, 53-55; App. A1-A3; VR No. 2, 9/7/11, 10:54:24-10:55:00). In this order, the court recounted the events leading to the exclusion of testimony concerning the destroyed video surveillance footage, the denial of the Commonwealth's motion for a continuance, and the dismissal of the case without prejudice. (TR 11CR0462, 53-55; App. A1-A3). The court stated that "[t]he Commonwealth failed to cite any legal basis for its offering of testimony concerning the contents of a videotape that it failed to preserve for the purposes of trial and failed to produce despite repeated requests during discovery" and indicated that the court had "ruled the absent tape and any testimony concerning its contents would not be admissible at trial" based on "the reasons stated on the record...." (TR 11CR0462, 53; App. B1). The court noted "[t]he parties, having received the ruling of the court concerning the videotape and with full knowledge of its implications, proceeded to a lengthy individual voir dire

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that it probably no longer existed, and that she would not seek to introduce the video at trial. (VR No. 3, 8/15/11, 10:26:14-10:27:33). The prosecutor never stated she intended to introduce testimony concerning the missing surveillance video until the morning of trial, even though defense counsel had made her objections to such testimony known as early as August 15. (VR No. 3, 8/15/11, 10:27:33-10:28:01; VR No. 1, 9/6/11, 12:08:50-12:09:02).

of the jury panel" and that that it was not until the next day that "the Commonwealth indicated it had a 'wrinkle' in its case" and "moved to continue the trial due to a 'missing witness.'" (TR 11CR0462, 54; App. B2). In addition, "[t]he Commonwealth made vague reference to the Court's ruling on the issue of the videotape the previous day as somehow combining with the missing witness to make it 'impossible to prove [its] case.'" (TR 11CR0462, 54; App. B2). However, "[t]he motion [for a continuance] was considered and denied," and the Commonwealth then "moved to dismiss its case without prejudice," which the court granted. (TR 11CR0462, 55; App. B3). The Commonwealth subsequently appealed from this order. (TR 11CR0462, 58-59).

On November 21, 2014, the Court of Appeals rendered a "to be published" opinion reversing the order of the Jefferson Circuit Court. (App. A1-A49). The Court of Appeals "reverse[d] the circuit court's order dismissing the case," finding "the circuit court's order arbitrary and unsupported by sound legal principles, and further [finding] no alternative grounds for affirming the court's ruling to exclude other evidence of the destroyed videotape...." (App. A48). The Court of Appeals declined to address the Commonwealth's additional argument that the circuit court abused its discretion when it overruled the Commonwealth's motion for a continuance, finding the issue moot. (App. A48).[3] This Court subsequently granted Garry Newkirk's motion for discretionary review.

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[3] Because the propriety of the circuit court's denial of the Commonwealth's motion to continue was not addressed by the Court of Appeals, it will not be addressed as an issue in this appeal.

ARGUMENT

I. The circuit court properly excluded testimony about the contents of the destroyed surveillance video.

As this Court has explained, "[t]rial courts enjoy substantial discretion in admitting or excluding evidence at trial. Indeed, there are many instances where a trial court will not err regardless of whether the evidence is admitted or excluded because of this broad discretion." Daugherty v. Commonwealth, 467 S.W.3d 222, 231 (Ky. 2015). Therefore, "[a] trial court's evidentiary ruling will be upheld unless the court has abused its discretion." Jones v. Commonwealth, 366 S.W.3d 376, 381 (Ky. 2011), citing Goodyear Tire and Rubber Co. v. Thompson, 11 S.W.3d 575, 581 (Ky. 2000). "The test for abuse of discretion is whether the trial judge's decision was arbitrary, unreasonable, unfair, or unsupported by sound legal principles." Commonwealth v. English, 993 S.W.2d 941, 945 (Ky. 1999). In this case, the circuit court did not abuse its discretion, and its ruling is supported by the rules of evidence, Kentucky case law, the federal and state constitutions, and fundamental considerations of fairness.

According to KRE 701:

> If the witness is not testifying as an expert, the witness' testimony in the form of opinions or inferences is limited to those opinions or inferences which are:
> (a) Rationally based on the perception of the witness; and
> (b) Helpful to a clear understanding of the witness' testimony or the determination of a fact in issue.

"However, KRE 701 must be read in conjunction with KRE 602, which limits a lay witness's testimony to matters to which he has personal knowledge." Mills v.

Commonwealth, 996 S.W.2d 473, 488 (Ky. 1999), cert. denied 528 U.S. 1164, 120 S.Ct. 1182, 145 L.Ed.2d 1088 (2000), overruled on other grounds by Padgett v. Commonwealth, 312 S.W.3d 336 (Ky. 2010). See also KRE 602 ("A witness may not testify to a matter unless evidence is introduced sufficient to support a finding that the witness has personal knowledge of the matter.").

The Court of Appeals found that neither KRE 602 nor KRE 701 prohibits Detective Lewis from testifying about the video because "the Commonwealth indicates that it intends to elicit only fact testimony from the detective and not opinion testimony." (App. A29). According to the Court of Appeals, "the matter about which Detective Lewis would testify is the personal knowledge he gained from observing and perceiving the videotape before it was destroyed.... [H]e observed a video depicting a Caucasian male wearing blue jeans and a gray long-sleeve shirt who entered an apartment through a window the male pried open with tools." (App. A27). However, in open court, the Commonwealth stated that it needed the testimony about the apartment surveillance video to establish the link between the burglary and the surveillance video at a Circle K store that eventually led the police to Garry Newkirk. (VR No. 1, 9/6/11, 4:52:00-4:52:30). Detective Lewis believed that the clothing (i.e., blue jeans and a gray long sleeved shirt) on the man in the apartment surveillance video matched the clothing that Garry Newkirk was wearing in the Circle K surveillance video. (TR 11CR0462, 47). Therefore Detective Lewis would be testifying that it is his

opinion that the two men are the same person, and KRE 602 and KRE 701 govern the admissibility of that opinion testimony.

Crime scene videos, as well as actual footage of crimes, are admissible when the proper foundation has been laid. Fields v. Commonwealth, 12 S.W.3d 275, 279 (Ky. 2000), citing Bedell v. Commonwealth, 870 S.W.2d 779 (Ky. 1993), and Milburn v. Commonwealth, 788 S.W.2d 253 (Ky. 1989). In addition, this Court has recognized that a police officer may give "simultaneous commentary" in court while the crime scene video is being played for the jury. Fields, 12 S.W.3d at 280, and Milburn, 788 S.W.2d at 257. However, "simultaneous commentary" is only permitted where it is based on the officer's own personal observations and perceptions of the crime scene. Mills, 996 S.W.2d at 488. Although "simultaneous commentary" was not being offered in the case at hand, as the video had been destroyed, these cases are instructive because Detective Lewis did not have personal knowledge concerning the events captured on this video and was not present when the video was made.

The Court of Appeals points to the recent case of Morgan v. Commonwealth, 421 S.W.3d 388 (Ky. 2014), as demonstrating "how a lay person who has viewed a videotape can express an opinion, based on personal knowledge as required by KRE 602, as to the identity of an individual whose image is captured on that videotape."(App. A31). In that case, three of the defendant's acquaintances, "who were familiar with his appearance at the time of the robbery" but were not present during the robbery, were asked to testify as

to whether the person on the store surveillance video was the defendant. Morgan, 421 S.W.3d at 391. Under those circumstances, this Court found that "the testimony of these three witnesses was relevant, probative, and otherwise proper lay witness testimony" because it "does not implicate impermissible 'narrative-style testimony' or any other improper description of video or photo images from a witness' perspective. Morgan, 421 S.W.3d at 392, citing Cuzick v. Commonwealth, 276 S.W.3d 260, 265 (Ky. 2009), and Mills v. Commonwealth, 996 S.W.2d 473, 488 (Ky. 1999) (overruled on other grounds by Padgett v. Commonwealth, 312 S.W.3d 336 (Ky. 2010). In contrast, Detective Lewis did not know Garry Newkirk and was being asked to provide improper opinion testimony, i.e., that the clothing on the man in the apartment surveillance video matched the clothing that Garry Newkirk was wearing in the Circle K surveillance video.

The Court of Appeals also relies on cases from other jurisdictions to support its contention that testimony concerning the destroyed video should have been allowed. (App. A27-28, A33-A35, A42-A45). However, these cases can be distinguished from the case at hand. In State v. Thorne, 618 S.E.2d 790 (N.C. App. 2005), for example, the Court of Appeals of North Carolina upheld the admission of testimony by a police officer that the gait of the perpetrator, observed from a lost surveillance video, was similar to defendant's gait. However, the officer was not only "trained to notice differences in the actual ways people walk[ed]" but also had personally observed the defendant's gait in the past. Thorne, 618 S.E.2d at 795. The Court of Appeals of North Carolina

subsequently distinguished Thorne in the case of State v. Buie, 671 S.E.2d 351, 356 (N.C. App. 2009), finding that the trial court erred in allowing the detective to narrate surveillance tapes and offer his opinion of what the tapes depicted where his testimony "was not based on any firsthand knowledge or perception by the officer, but rather solely on the detective's viewing of the surveillance video." Similar to the officer in Buie, Detective Lewis had no firsthand knowledge of Garry Newkirk or his clothing, and his opinion that the man in the apartment video surveillance was wearing the same clothing as Garry Newkirk on the Circle K surveillance video was based solely on the detective's viewing of the surveillance video and was not admissible. In addition, in State v. Belk, 689 S.E.2d 439, 441 (N.C. App. 2009), the Court of Appeals of North Carolina found reversible error where the trial court allowed a police officer to identify the defendant as the person depicted in the video surveillance footage because the officer "was in no better position than the jury to identify Defendant as the person in the surveillance video...."

In State v. Rollins, 257 P.3d 839, 848 (Kan. App. 2012), the Court of Appeals of Kansas concluded that the "testimony was based on personal knowledge of the surveillance videos' contents and, consequently, a proper foundation was laid for...testimony about what he observed on the videos." But unlike the case at hand, both of the witnesses who were allowed to testify about the surveillance video in State v. Rollins knew the defendant and could identify him in the video. Id.

The Court of Appeals also cites to cases from Georgia and Indiana: Hammock v. State, 715 S.E.2d 709 (Ga. App. 2011), and Pritchard v. State, 810 N.E.2d 758, 760-761 (In. App. 2004). (App. A34). In those cases, defense counsel objected on hearsay grounds to the admission of testimony concerning deleted surveillance video, but the appellate courts found that the observations were not hearsay. The Court of Appeals noted that this Court cited much of the same authority in the unpublished case of Harwell v. Commonwealth, No. 2009-SC-000333-MR, 2011-WL-1103112 (Ky. 2011)[4] as the Georgia Court of Appeals cited in Hammock v. State. (App. A35). Although Kentucky's appellate courts have not specifically addressed the admissibility of testimony concerning the contents of destroyed video surveillance footage in a published opinion, the appellant agrees that Harwell appears to provide instructive guidance.

In Harwell, this Court relied on KRE 602 in concluding that it was improper for the Commonwealth's witnesses to interpret a segment of a surveillance video where the witnesses were not personally present during that time: "Neither woman was present to witness such events and it is 'for the jury to determine as best it can what is revealed in the tape recording without embellishment or interpretation by a witness.'" Harwell, 2011-WL-1103112, *9, quoting Gordon v. Commonwealth, 916 S.W.2d 176, 180 (Ky. 1995) (App. C7). Although the witnesses "could testify about matters within their personal knowledge...they

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[4] Pursuant to CR 76.28(4)(c), a copy of this unpublished opinion is attached as Appendix C.

could not interpret the video or speculate about matters not within their personal knowledge." Harwell, 2011-WL-1103112, *9, citing KRE 602 and Gordon v. Commonwealth, 916 S.W.2d 176, 179 (Ky. 1995) (App. C7). This is because "[w]hen a witness interprets what is on a tape, he impermissibly invades the province of the jury." Harwell, 2011-WL-1103112, *9, citing Cuzick v. Commonwealth, 276 S.W.3d 260, 265-266 (Ky. 2009) (App. C7). This Court also found that it was improper for witnesses to testify about a portion of the surveillance video that was not played for the jury: "In that instance, the video was being used to prove events not directly observed by [the witnesses] and, per the best evidence rule, the video should have been produced." Harwell, 2011-WL-1103112, *10 (App. C8).

The ruling made by the circuit court in this case excluding testimony about the contents of the destroyed video footage is entirely consistent with the reasoning articulated by this Court in Harwell. Detective Lewis had no personal knowledge about the events he reviewed on the video surveillance, and it would have been inappropriate for him to interpret the video or speculate about its contents. The fact that the video no longer exists and cannot be played for the jury should not render this otherwise inadmissible testimony admissible. The Commonwealth should not be permitted to benefit to the detriment of the defendant, especially where the defendant never had access to the video. Nor would the prejudice be lessened if Detective Lewis just testified that he observed a white male wearing blue jeans and a grey long sleeved shirt on the surveillance

video. The jury would still be led to infer that the detective thinks it is the same person as the man recorded on the Circle K surveillance footage – Garry Newkirk. Had the video been available and the proper foundation laid for its admission into evidence, the jurors would have been allowed to make their own inferences and draw their own conclusions without any commentary by Detective Lewis. As this Court held in Mills, "simultaneous commentary" is only permitted where it is based on the officer's own personal observations and perceptions. Mills, 996 S.W.2d at 488. Detective Lewis was not present when the events on the video occurred, and the contents of the video are not within his personal knowledge and experience.

The Court of Appeals also "conclude[d], pursuant to KRE 402[5] and 1004(1)[6], that the testimony of Detective Lewis (and anyone who viewed the videotape) is admissible [as] other evidence of the contents of the destroyed videotape." (App. A44). According to the Court of Appeals, testimony about the contents of the destroyed video is not only relevant but also falls within KRE 1004(1), which is an exception to the KRE 1002[7] best evidence rule. The Court of

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[5] "All relevant evidence is admissible, except as otherwise provided by the Constitutions of the United States and the Commonwealth of Kentucky, by Acts of the General Assembly of the Commonwealth of Kentucky, by these rules, or by other rules adopted by the Supreme Court of Kentucky. Evidence which is not relevant is not admissible." KRE 402.

[6] "The original is not required, and other evidence of the contents of a writing, recording, or photograph is admissible if:
(1) Originals lost or destroyed. All originals are lost or have been destroyed, unless the proponent lost or destroyed them in bad faith." KRE 1004(1).

Appeals cited to one of its own unpublished opinions as illustrating "the workings of the best evidence rule": Haley v. Commonwealth, No. 2011-CA-001987-MR, 2013-WL-4508177 (Ky. App. 2013)[8]. (App. A41-A42).

In Haley, a state trooper was allowed to testify concerning the contents of a surveillance video filmed at a pawnshop where stolen rings were recovered. Even though the video was not produced at trial because it had been taped over, the trooper testified that he knew the defendant by sight and recognized him on the video. Haley, 2013-WL-4508177, *2. The Court of Appeals addressed this unpreserved issued:

> In this appeal, we do not believe that the admission of Trooper Dukes' testimony concerning the contents of the videotape constituted a substantial error under RCr 10.26. Under KRE 1004(1), the original videotape recording is not required if "[a]ll originals are lost or have been destroyed, unless the proponent lost or destroyed them in bad faith[.]" Here, the evidence revealed that the original surveillance videotape was destroyed before a copy could be made. It appears that the original surveillance videotape was inadvertently rewound and copied over by the pawn store. Thus, the destruction of the original surveillance videotape was not due to bad faith but rather was a mistake. Moreover, Trooper Dukes testified that he recognized appellant on the original surveillance videotape.

Haley, 2013-WL-4508177, *2-3.

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[7] "To prove the content of a writing, recording, or photograph, the original writing, recording, or photograph is required, except as otherwise provided in these rules, in other rules adopted by the Kentucky Supreme Court, or by statute." KRE 1002.

[8] Pursuant to CR 76.28(4)(c), a copy of this unpublished opinion is attached as Appendix D.

Unlike the State Trooper in Haley, Detective Lewis did not know Garry Newkirk by sight and could not positively identify him as the person on the apartment surveillance video. Instead, Detective Lewis would have given his opinion that the man in the apartment surveillance video was wearing the same clothing that Garry Newkirk was wearing in the Circle K surveillance video. (TR 11CR0462, 47). However, the circuit court correctly held that such testimony was inadmissible.

The Court of Appeals looks to cases from other jurisdictions to support its contention that the exception to the best evidence rule permits introduction of testimony about destroyed videotapes. (App. A41-44, fn. 23). But contrary to the Court of Appeals' assertion, these cases do not present "similar facts." (App. A43). Although in State v. Nelsen, 183 P.3d 219, 223, 225-226 (Or. App. 2008), the Court of Appeals of Oregon determined that the trial court had erred in preventing the state from introducing testimony about the contents of the lost recording, the "defendant's argument for exclusion under the best evidence rule was predicated solely on the 'bad faith' proviso of [Oregon's Rule of Evidence] 1004(1)." "The question of whether the videotape was actually lost or destroyed is a matter of fact, which we, as an appellate court, cannot determine in the first instance." State v. Nelsen, 183 P.3d 219, 223 (Or. App. 2008).

Harney v. City of Chicago, 702 F.3d 916, 922 (7th Cir. 2012), addressed a summary judgment issue in a 42 U.S.C. § 1983 action involving a warrantless arrest case: "As explained in the district court's opinion, while the videotapes

submitted in support of summary judgment contain footage *not* contained in the compilation video, and therefore Midona did not view the entirety of the footage submitted at summary judgment, there is no dispute that Midona viewed the portions of the tape relevant to the court's determination of whether probable cause existed."

Domingo v. Boeing Employees' Credit Union, 98 P.3d 1222, 1225-26 (Wash. App. 2004), involved an employee discrimination action. The court found that "testimony [about the missing video] was not offered for the truth of the matter asserted. Rather, it was offered to show [the supervisor's] motivation for the decision to reprimand and eventually terminate Domingo's employment."

In Commonwealth v. Dent, 837 A.2d 571, 590 (Pa. Super. 2003), a bench trial was held in a shoplifting case. The store manager was unable to save the video surveillance footage that he had reviewed, but his identification of defendant was "based on personal knowledge" because he "had encountered [the defendant] face-to-face in the store and had found unpaid-for store items in her bag." The police officer's "testimony about the videotape...was used for the limited purpose of his course of investigation [and] [t]o the extent it was used to establish [the defendant's] presence in the store, it was cumulative of [the store manager's] properly admitted identification testimony." Id. The court also emphasized the difference in admitting certain evidence in jury trials versus bench trials:

> Indeed, the concern with identification evidence presented in the form of oblique narratives relating the course of police investigation

> is that a jury will accept third-party declarations as substantive evidence of guilt without giving the defendant an opportunity to cross-examine the declarant...This concern, however, does not predominate in non-jury trials, because "trial judges sitting as fact finders in criminal cases are presumed to ignore prejudicial evidence in reaching a verdict."...In a non-jury trial, the judge is presumed to have disregarded inadmissible hearsay testimony.

Commonwealth v. Dent, 837 A.2d 571, 582 (Pa. Super. 2003) (internal citations omitted).

In State v. Johnson, 704 So.2d 1269, 1274-1275 (La. App. 2 Cir. 1997), the court found that the best evidence rule had not been violated by having two police officers and the defendant's probation officer testify that a deleted surveillance video "showed the shirtless defendant yelling expletives and then firing a pistol into the store from the doorway" where "the video tape of these events [was] inadvertently deleted when the tape was recorded over the next day." Presumably, at least the probation officer knew the defendant and could identify him based on personal knowledge.

In Wood v. State, 18 S.W.3d 642, 646-647 (Tex. Crim. App. 2000), the appellant told his brother, Jonathan, to destroy the surveillance video after viewing it: "When Jonathan expressed his disbelief that they had committed murder, appellant played the surveillance video showing Reneau shoot the victim. Then, pursuant to appellant's instructions, Jonathan destroyed the video with a blowtorch." Based on these facts, the court found that the trial court did not abuse its discretion in admitting Jonathan's testimony about the contents of the video:

> Jonathan testified that he destroyed the tape with a blowtorch; accordingly, the State was authorized to prove its contents through "other evidence." See Tex. R. Crim. Evid. 1004. Jonathan, who was familiar both with appellant and Reneau, identified them on the tape and possessed sufficient knowledge to testify to the tape's contents. See Tex. R. Crim. Evid. 901(b)(1) and (4). Moreover, the circumstances surrounding Jonathan's viewing of the tape—*i.e.,* that appellant played the tape for him to prove that they had committed murder during the course of stealing the safe—serve to authenticate its contents. See Tex. R. Crim. Evid. 901(b)(4). The State's method of authentication satisfied the requirements of Rules 901 and 1004 in this case.

Id. at 647.

In Footnote 23 of its opinion, the Court of Appeals also cites to four unpublished cases from other jurisdictions. Two of the unpublished cases upheld the admission of testimony concerning deleted surveillance footage where the witness had no firsthand knowledge of the event and had simply reviewed the video: United States v. Ortiz, 2013 WL 101727, at *2 (E.D. Pa. Jan. 7, 2013) (unpublished memorandum ruling overruling the defendant's pretrial motion to preclude testimony under FRE 1002); State v. Timothy P., 2013 WL 6662708, at *1 (N.M. Ct. App. Nov. 21, 2013) (unpublished case in which police officers were permitted to testify about school surveillance footage they reviewed before it was deleted). However, in the other two unpublished cases, the witnesses had personal knowledge of the defendant: United States v. Clark, 2011 WL 6019313, at *1 (A.F. Ct. Crim. App. Aug. 15, 2011) (unpublished case where store detectives had sufficient personal knowledge to testify concerning appellant's identity in missing video and photograph); People v. White, 2007 WL 778136, at *1 (Mich. Ct. App. Mar. 15, 2007) (unpublished case in which the witness did not

see the initial interaction between the defendant and the officers but later "heard the officers asking defendant to get down on the ground and saw that defendant was not complying.") In addition, the "best evidence" issue was not properly preserved for appellate purposes in People v. White.

The appellant is aware that this Court recently upheld the admission of testimony concerning the contents of destroyed video surveillance footage in the unpublished opinion of Johnson v. Commonwealth, No. 2013-SC-0000787-MR, 2015 WL 3635292 (Ky. 2015) (App. E1-E9).[9] In that case, a police officer was permitted to testify about a lost surveillance video from a store which was never produced to the defendant and was not played for the jury at trial. Specifically, "Officer Stratton testified that he personally viewed the video which showed three males in hooded sweatshirts breaking into the store and ransacking it." Johnson v. Commonwealth, 2015 WL 3635292, at *6 (App. E6). This Court held that the failure to produce the original video recording did not violate the best-evidence rule and that the prosecution sufficiently established that neither the Commonwealth nor the police acted in bad faith. Johnson v. Commonwealth, 2015 WL 3635292, at *6 (App. E7). This Court also found that "Officer Stratton's testimony was not hearsay" and that the Confrontation Clause was not implicated. Johnson v. Commonwealth, 2015 WL 3635292, at *7 (App. E7).

However, in Johnson v. Commonwealth, this Court did not address KRE 602 and KRE 701 and the admissibility of *opinion testimony* concerning the

[9] Pursuant to CR 76.28(4)(c), a copy of this unpublished opinion is attached as Appendix E.

contents of a missing video. Although the officer in Johnson was allowed to describe what he had seen on the video, he was not permitted to tell the jury that the men in this missing video looked like the same men in another video. In the case at hand, the Commonwealth intended to introduce testimony through Detective Lewis that he believed the clothing (i.e., blue jeans and a gray long sleeved shirt) on the man in the apartment surveillance video matched the clothing that Garry Newkirk was wearing in the Circle K surveillance video and that the two men are the same person. (TR 11CR0462, 47). The Commonwealth specifically stated that it needed the testimony about the apartment surveillance video to establish the link between the burglary and the surveillance video at a Circle K store that eventually led the police to Garry Newkirk. (VR No. 1, 9/6/11, 4:52:00-4:52:30).

In addition, this Court did not explain how Johnson v. Commonwealth can be reconciled with this Court's opinion in Mills v. Commonwealth, 996 S.W.2d 473, 488 (Ky. 1999), which held that a police officer's "simultaneous commentary" when playing a crime scene video for the jury is only permitted where it is based on the officer's own personal observations and perceptions of the crime scene. Detective Lewis did not have personal knowledge concerning the actual events captured on this video and was not present when the video was made. It is also important to note that the Court emphasized that "any possible prejudice was eliminated because the trial court gave a missing evidence instruction, allowing the jury to infer that the lost video would be

favorable to Johnson's case if it were available." Johnson v. Commonwealth, 2015 WL 3635292, at *7.

Even if testimony about a missing video could be admissible in some cases, it was not admissible under the circumstances presented in this case. First, the testimony would have been unduly prejudicial under KRE 403. As the Commonwealth made clear, it intended to use Detective Lewis's testimony about the apartment complex surveillance video to establish that Garry Newkirk was the person who committed the burglary. According to the summary he made for purposes of trial, Detective Lewis would have testified that the man in the apartment surveillance video was wearing the same clothing that Garry Newkirk was wearing in the Circle K surveillance video, and, therefore, was Garry Newkirk. (TR 11CR0462, 47). However, defense counsel could not have fully and effectively cross-examined Detective Lewis about this opinion without having had access to both videos. "It is well established that the right to cross-examine a witness to impeach his or her credibility is fundamental to a fair trial." Mounce v. Commonwealth, 795 S.W.2d 375, 378 (Ky. 1990), citing Davis v. Alaska, 415 U.S. 308, 94 S.Ct. 1105, 39 L.Ed.2d 347 (1974). "[T]he credibility of every witness presented to testify in a legal proceeding...is subject to attack and cross-examination, this being the primary means by which trial counsel can attempt to persuade jurors of the weight or significance to be attached to the testimony of the witnesses...." Brown v. Commonwealth, 934 S.W.2d 242, 247 (Ky. 1996). Limitations on the right of cross-examination are restrictions on a fundamental

constitutional right and "such limitations should be cautiously applied." Commonwealth v. Maddox, 955 S.W.2d 718, 720 (Ky. 1997). Moreover, "[a] denial of effective cross-examination is a constitutional error of the first magnitude, and no showing of want of prejudice will cure it." Eldred v. Commonwealth, 906 S.W.2d 694, 702 (Ky. 1994), modified by Commonwealth v. Barroso, 122 S.W.3d 554 (Ky. 2003), and citing Davis, 415 U.S. at 318-319, 94 S.Ct. at 1111-1112, 39 L.Ed.2d at 355 (1974).

As the circuit court correctly concluded, it would not have been equitable to allow testimony about the missing video and what it allegedly revealed when the defendant had never had the opportunity to review that video. As the court further opined, permitting such testimony would open the door to future abuses because the police and the Commonwealth would have no reason to preserve and turn over videos in discovery if witnesses could simply watch a video and then testify about what they purportedly saw. In this case, the police could have taken custody of the video at the time of review rather than leaving it in the apartment complex video system to be recorded over. The Commonwealth and their agents cannot ignore their duty to preserve evidence by simply leaving the evidence in the hands of a third party.

The circuit court's ruling comports with the Kentucky Rules of Evidence, is consistent with this Court's opinions in Mills v. Commonwealth, 996 S.W.2d 473 (Ky. 1999), and Harwell v. Commonwealth, No. 2009-SC-000333-MR, 2011-WL-1103112 (Ky. 2011), and properly protects Garry Newkirk's rights to a fair trial

and effective cross-examination, as guaranteed by the 6th and 14th Amendments to the United States Constitution and Sections 2 and 11 of the Kentucky Constitution. Because the circuit court did not abuse its discretion in excluding testimony about the deleted video surveillance footage, this Court should uphold the circuit court's ruling.

CONCLUSION

For the foregoing reasons, the appellant, Garry W. Newkirk, by counsel, respectfully requests that this Court affirm the order of the Jefferson Circuit Court.

Elizabeth B McMahon

ELIZABETH B. McMAHON
Assistant Public Defender
Office of the Louisville Metro
Public Defender
Advocacy Plaza
717-719 West Jefferson Street
Louisville, Kentucky 40202
(502) 574-3800
Counsel for Appellant

Daniel T. Goyette

DANIEL T. GOYETTE
Louisville Metro Public Defender
Of Counsel